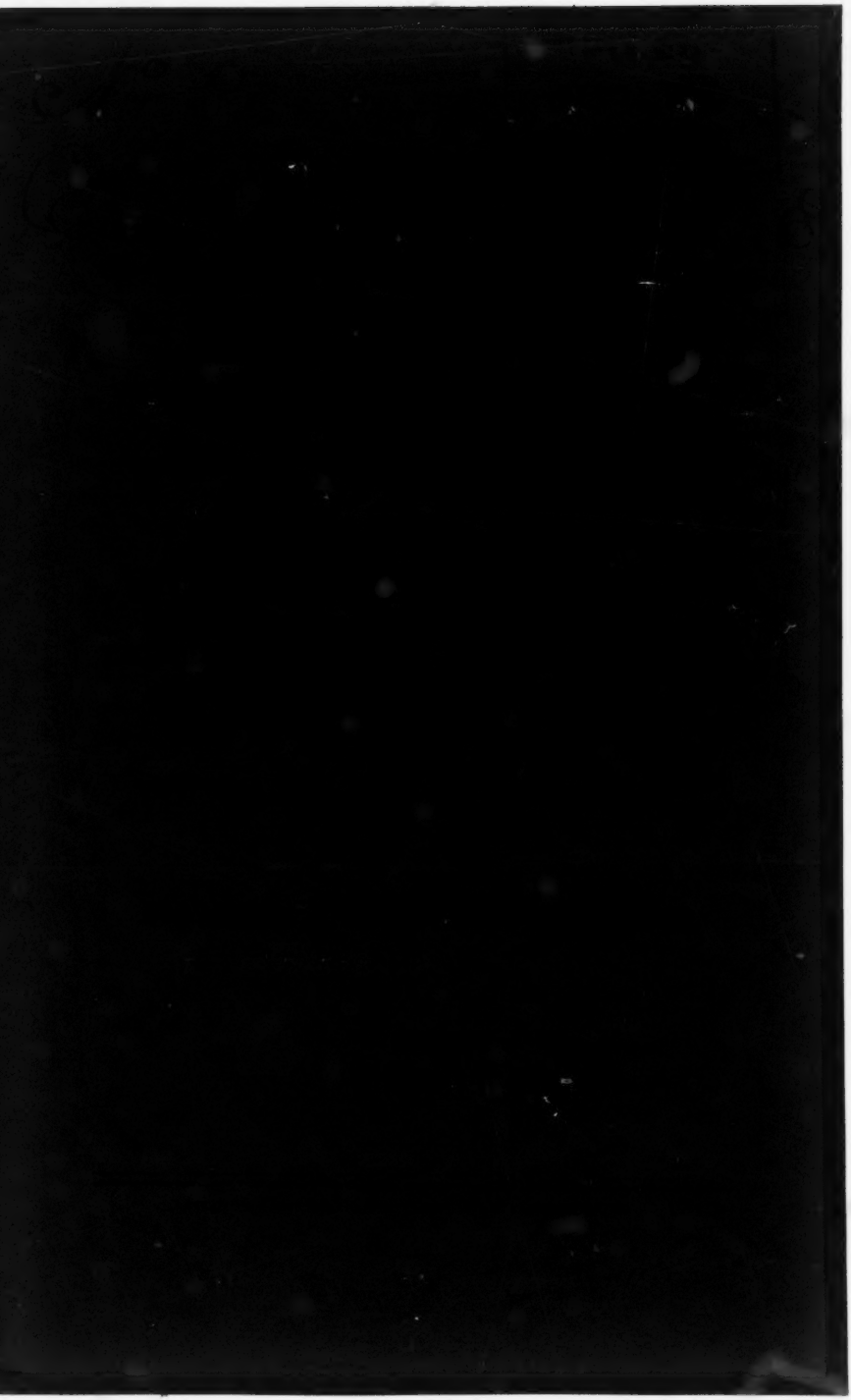

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 81.

THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

This is an action of debt and foreclosure by the State of Texas on bonds. Aside from the question of jurisdiction, the principal question involved is whether payments alleged to have been made by the plaintiff in error and the Washington County Railroad Company, which it succeeded, of certain interest and principal in treasury war-

rants issued by the State of Texas during the civil war, were valid and binding.

History of the Question.

By an act of the legislature of Texas approved January 31, 1854, $2,000,000 of the bonds received by the State from the United States in settlement of the boundary controversy of 1850 were set aside as a special school fund.

Gen. Laws Texas 1854, p. 17.

By an act of the legislature approved August 13, 1856, this special school fund was authorized to be loaned to railroad companies incorporated by the State. The loans were to be made by a board of school commissioners composed of the governor, comptroller, and attorney general, at the rate of $6,000 per mile of road, secured by bonds of the companies, bearing 6 per cent. interest, with 2 per cent. additional as sinking fund, payable to the State of Texas, which by said law constituted a lien upon the roads and charter rights of the companies, without the necessity of deeds or registration. The bonds, sinking fund of 2 per cent., and interest coupons were payable in dollars, meaning *lawful money of the United States.*

Gen. Laws Texas 1856, p. 31.

This act was amended August 26, 1856, and January 22, 1858, but in particulars not pertinent to this controversy.

The Galveston and Red River Railway Company was incorporated in 1848, and in 1856 its name was changed to the Houston and Texas Central Rail*way* Company. The Washington County Railroad Company was incorporated in 1856, and in 1870 it was consolidated with the Houston and Texas Central Rail*way* Company, the latter becoming liable for the debts of the former. In the meantime each of these companies had borrowed money from the State

under the act of August 13, 1856, referred to, the aggregate balance being that involved in this action. In 1886 all the property of the Houston and Texas Central Railway Company, including the property upon which the State has a lien to secure the loans mentioned, was sold under an order of court, and the purchaser formed under the general laws of Texas the corporation known as The Houston and Texas Central Railroad Company, plaintiff in error, and this company now owns and operates the railway property, including the road formerly owned by the Washington County Railroad Company.

By section 8, article 7, of the constitution of Texas of 1845, it was provided :

"And in no case shall the legislature have the power to issue treasury warrants, treasury notes or paper of any description intended to circulate as money."

Sayles' Constitutions, p. 208.

By section 14, article 1, of the constitution of 1845, it was provided that—

" No bill of attainder, *ex post facto* law, retroactive law, *or any law impairing the obligation of contracts*, shall be made."

Sayles' Constitutions, p. 187.

The Texas ordinance of secession was adopted February 1, 1861.

Sayles' Constitutions, p. 258.

By section 8, article 7, of the constitution of Texas of 1861, it was provided :

"And in no case shall the legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money."

Sayles' Constitutions, p. 245.

By section 14, article 1, of the constitution of 1861, it was provided that—

"No bill of attainder, *ex post facto* law, *retroactive law, or any law impairing the obligation of contracts*, shall be made."
Sayles' Constitutions, p. 227.

By the constitution of the Confederate States of America, ratified in Texas March 23, 1861 (Sayles' Constitutions, p. 274), it was provided by section 10, article 1:

"No State shall * * * make anything but gold and silver coin a tender in payment of debts * * * *pass any* * * * *law impairing the obligation of contracts.*"
Sayles' Constitutions, p. 288.

On February 14, 1860, an act of the legislature of Texas was approved authorizing unpaid warrants on the treasury to bear interest, and it was expressly provided that "said warrants shall not circulate as money, but may be assigned."
Gen. Laws Texas 1860, pp. 115, 116.

By an act of said legislature approved February 9, 1861, it was provided by section 1 "that the comptroller and treasurer shall receive treasury warrants *for money* in settlement with any individual indebted to the State for lands under the different pre-emption laws or laws authorizing the sale of university lands or laws providing for the sale of the public domain;" and by section 2 it was provided that "the board of school commissioners are hereby authorized to receive treasury warrants in payments of *the two per cent. for a sinking fund* payable by railroad companies in whose bonds the special school fund has been or may hereafter be invested."
Gen. Laws Texas 1861, p. 19.

An act approved January 10, 1862, expressly repealed the act approved February 14, 1860, above mentioned, and in

lieu thereof it was provided that warrants for legal claims should be drawn, if appropriations were made, and payment made if there was money in the treasury, "but if not, the comptroller shall issue one or more warrants for the amount that may be due, payable to the party entitled to payment, or bearer; and said warrants shall be of such proportions of the claim as may be expressly required by the holder, *provided* not more than one-tenth of the whole amount may be issued in warrants for one dollar each and the balance in warrants for five dollars or more each." The provision in the act of February 14, 1860, that "said warrants shall not circulate as money" was not re-enacted.

Gen. Laws Texas 1862, p. 34.

By an act approved January 11, 1862, it was provided "that the payment of all interest and the two per cent. sinking fund due and to become due on the bonds issued by the several railroad companies of the State of Texas for loans from the special school fund be and the same is hereby extended until the first day of January 1864 or until six months after the termination of the present war between the Confederate States and the United States of America, should it terminate before the time above named."

Gen. Laws Texas 1862, p. 37.

Another act approved January 11, 1862, provided that treasury warrants of the State not bearing interest and treasury notes and coupons of the Confederate States should be receivable "*as money*" for all obligations due the State except specific taxes for paying interest and principal of loans "and except dues of sinking fund and interest on school funds loaned to railroad companies."

Gen. Laws Texas 1862, p. 37.

On the same day, to wit, January 11, 1862, the legislature passed another act as follows:

"SECTION 1. *Be it enacted by the legislature of the State of Texas*, That the treasurer, and every other officer of the State, and every officer of counties, who, according to law, shall have received, as public money, treasury warrants of this State, or treasury notes of the Confederate States of America, or its coupons, shall disburse or transfer the same *as money*, at par, according to the laws providing for the disbursement or transfer of money, in the respective cases, if the person or persons entitled to have a disbursement or transfer will receive such warrants, notes and coupons as money; and officers who may be authorized to receive public money, are authorized and directed to receive such warrants, notes and coupons *as money*, except when expressly prohibited by some other law; and any officer, in making such disbursement and transfer, may adjust the balance by receiving a fractional part of the amount of any such warrant, note or coupon, in any of such funds or specie currency, in whole or in part, to be held and applied as that for which it was received, except that treasury warrants of the State, received by the treasurer thereof, shall not be reissued. Every public receiver of such warrants, notes and coupons, on reception thereof in each case, shall give a receipt, officially subscribed, specifying the kind and amount, respectively, of the funds received; and shall keep a corresponding account showing the several kinds and amounts received, and from whom, and shall be accountable in kind, with the qualification aforesaid, for whatever he may have thus received, or, in default thereof, for the same amount of specie currency. Any such receiver, in failing to comply with any of the foregoing requisitions, shall be deemed guilty of a misdemeanor, and on conviction thereof, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding one month, or by both fine and imprisonment as aforesaid, and may be removed from office by judgment of the court trying the case."

Gen. Laws Texas 1862, p. 38.

By an act approved December 16, 1863, it was provided by section 1 "that the comptroller of the State be and he is

hereby authorized to receive from the railroad companies in this State, who are indebted to the special school fund, *all interest* on their bonds that may now be or hereafter become due: *Provided*, The same is tendered in State bonds or in State treasury warrants previous to the meeting of the next regular session of the State legislature;" and by section 2 "that for all sums so paid in the comptroller and treasurer shall issue to the special school fund the bonds of the State bearing six per cent. interest."

Gen. Laws Texas 1863, p. 37.

This act was amended by an act approved May 28, 1864, to the effect that the act of 1863 should not apply to railroad companies that failed or refused to "receive State bonds or State treasury warrants at par for freight or passage at the prices or rates established by law," and when satisfactory evidence was furnished the comptroller of such failure or refusal he was required to decline accepting payment of interest in State bonds or warrants.

Gen. Laws Texas 1864, p. 9.

By an act approved November 15, 1864, it was provided "that the railroad companies of this State that are indebted to the special school fund shall continue to be allowed the privilege of paying the *interest* due said fund in the treasury warrants and bonds and coupons of the State and may also discharge the whole or any part of the *principal* of their indebtedness to that fund (in the same manner), provided said railroad companies shall satisfy the comptroller that the treasury warrants and bonds and coupons of the State are received by them at par with specie for freight and passenger travel," and that "all treasury warrants and bonds and coupons of the State so received into the treasury shall be cancelled and the comptroller shall issue the bonds of the State bearing six per cent. interest to the special school fund for the amounts so paid in."

Gen. Laws Texas 1864, p. 14.

The brief of plaintiff in error has not yet been filed. In the answer and in the only argument so far filed in this court it is urged that these transactions were recognized and approved by the State since the war. As bearing upon that, as well as other features of the case, it is interesting to follow the history of the matter further.

By section 8, article 7, of the constitution of Texas of 1866, it was provided: "And in no case shall the legislature have the power to issue treasury warrants, treasury notes or paper of any description intended to circulate as money," and by section 36, article 7, of that instrument, it was provided that "the legislature shall have no power directly or indirectly to release any railroad company from the payment *in specie* of the principal or interest of the obligations or debts due to the school fund or to the State."

Sayles' Constitutions, pp. 320, 325.

"All debts created by the State of Texas in aid of the late war, directly or indirectly," were declared null and void by the Texas convention of 1866, including warrants issued between January 28, 1861, and August 5, 1865.

Sayles' Constitutions, pp. 333, 334.

U. S. Constitution, sec. 4, amendment 14.

By section 6 of an act of the legislature of Texas approved November 9, 1866, indebtedness of the State which accrued subsequent to March 2, 1861, and prior to September 6, 1865, was in effect declared void.

Gen. Laws Texas 1866, p. 124.

It was provided by section 7 of an act approved November 10, 1866, "that all railroad companies that are owing interest upon their bonds for loan of the common-school fund shall have an extension of time for the payment of the interest now due, as follows: The entire amount of interest now due shall be divided into eight equal parts, and

paid as follows, *in specie:* One equal eighth part due by each company shall be paid on or before the first day of January next; and one equal eighth part every six months thereafter until the entire amount shall have been paid; *provided* that on failure of any company to pay any one of such installments, as above stipulated, such company shall forfeit the benefits of this act and the entire amount of interest then due shall be collected as now provided by law."

Gen. Laws Texas 1866, p. 129.

The committees on education and finance in the reconstruction convention of Texas denounced the attempted payment of this debt in warrants as inequitable and void.

Journal of Convention, pp. 482, 604, 605, 607.

The reconstruction convention adopted August 29, 1868, a declaration practically consolidating the Houston and Texas Central railway and the Washington County railway, and authorized the provisional governor to accept bonds of the former road "for the whole amount of principal and interest due to the State" from both roads on the 1st day of July, 1868. This, taken in connection with other matters, is a declaration of the invalidity of the payments in warrants, but the exchange was never made.

Journal of Convention, pp. 886, 907, 939.

It should be borne in mind also that the authority of this convention was only to "frame a constitution and civil government" in conformity with the reconstruction acts of Congress to be submitted to the people.

The following provisions of the constitution of Texas of 1869 are pertinent:

SECTION 6, ARTICLE 12:

"And in no case shall the legislature have the power to issue treasury warrants, treasury notes or paper of any description intended to circulate as money."

SECTION 34, ARTICLE 12:

"*All* debts created by the so-called State of Texas from and after the 28th day of January, 1861, and prior to the 5th day of August, 1865, were and are *null and void;* and the legislature is prohibited from making any provision for the acknowledgment or payment of such debts."

SECTION 14, ARTICLE 1:

"No bill of attainder, *ex post facto* law, *retroactive law, or any law impairing the obligation of contracts,* shall be made * * * nor shall any law be passed *depriving a party of any remedy for the enforcement of a contract which existed when the contract was made.*"

Sayles' Constitutions, pp. 387, 388.

SECTION 9, ARTICLE 9:

"The legislature shall *annually appropriate for school purposes* and to be equally distributed among all the scholastic population of the State, *the interest* accruing on the school fund, and the income derived from taxation for school purposes; and shall from time to time, as may be necessary, invest the *principal* of the school fund in the bonds of the United States Government; *and in no other security.*"

SECTION 6, ARTICLE 9:

"As a basis for the establishment and endowment of said public free schools, all the funds, lands and other property *heretofore* set apart and appropriated, or that may hereafter be set apart and appropriated for the support and maintenance of public schools, shall constitute the public school fund. And all sums of money that may come to this State hereafter from the sale of any portion of the public domain of the State of Texas, shall also constitute a part of the public school fund. And the legislature shall set apart, for the benefit of public schools, one-fourth of the annual revenue derivable from general taxation; and shall also cause to be levied and collected an annual poll tax of one dollar on all male persons in this State, between the ages of twenty-one and sixty years, for the benefit of public schools. And said fund

and the income derived therefrom and the taxes herein provided for school purposes, shall be the perpetual fund, to be applied, as needed, exclusively for the education of all the scholastic population of the State; *and no law shall ever be made appropriating such fund for any other use or purpose whatever.*"

Sayles' Constitutions, pp. 447, 465, 441, 442, 443.

On August 13, 1870, an act was approved for the "relief" of railroad companies indebted to the State for loans from the special school fund. By section 1 it was provided that any company so indebted to the State might avoid the sale of its road for non-payment of principal or interest by the payment into the treasury of the State on the first day of November, 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, 1870, and by the payment, in addition, on said first day of November of 1 per cent. upon said aggregate amount, to be applied toward the sinking fund provided for by existing laws in respect to said loans, and by continuing to pay into the treasury of the State six months' interest and 1 per cent. on account of said sinking fund semi-annually thereafter. By section 2 it was provided that if any company failed to pay according to the act, then the whole debt became due, and the governor was authorized to sell the road, and by section 3 it was provided that the State would not exact payment of the principal except through the 1 per cent. sinking fund, but any company might pay the principal in full at any time on thirty days' notice to the governor, and that the mortgage of the State should not attach to road thereafter constructed.

Gen. Laws Texas 1870, p. 85.

The legislature of Texas passed an act known as the special law of August 15, 1870. It was vetoed by Governor Davis in a strong message (Record, pages 142 to 146), but

was passed over the veto. In its bearing upon the principal question on the merits of this case, this act consolidated the Houston and Texas Central railway and the Washington County railroad; provided that "for the whole amount of principal and interest due to the State by the Houston and Texas Central Railway Company and the Washington County Railroad Company, on the first day of July, 1870, the governor of the State shall accept and receive from the Houston and Texas Central Railway Company the seven per cent. land-grant sinking-fund first-mortgage gold interest-bearing bonds of said company, which said bonds, also payable in gold, are issued, or to be issued by virtue of a deed of trust executed by the said company on the first day of July, 1866, and mature on the first day of July, 1891;" that "the governor shall, after making the exchange of bonds herein provided for, cancel and deliver to said railway company, the six per cent. bonds of the Houston and Texas Central Railway Company and of the Washington County Railroad Company, now held by the State for sums borrowed from the school fund," and that "in making the settlement herein provided for the Houston and Texas Central Railway Company shall be allowed a credit for the sums paid in the treasury warrants of the State during the years 1864 and 1865, by the said company and by the Washington County Railroad Company, upon the accounts on which said sums were respectively paid by said companies, the said sums amounting in the aggregate to $152,864.55."

Special Laws Texas 1870, pp. 326, 327.

Governor Davis and all the succeeding executives refused to execute this law as to exchange of bonds and crediting payments in warrants, upon the ground, it is presumed, that in their opinion it was unconstitutional and void. The comptroller of public accounts of the State, after the passage of this act, acting upon the opinion of the attorney general,

which will be found in the appendix to the journal of the reconstruction convention, refused to allow credits for alleged payments in State warrants, and this action has been followed by his successors in office. A new principal was determined by the comptroller by adding to the balance of the principal loaned to the companies the balance of the interest due, excluding from the computation all payments in State warrants. The companies made payments from 1870 until 1893, inclusive, under protest, and this action was instituted in 1894 upon default in payments.

The constitution of Texas of 1876 (section 54, article 3) provides:

"The legislature shall have no power to release or alienate any liens held by the State upon any railroad or in anywise change the tenor or meaning or pass any law explanatory thereof; but the same shall be enforced in accordance with the original terms upon which it was acquired."

Sayles' Constitutions, p. 523.

On February 23, 1883, an act was approved which provided that the bonds for the sum of $320,367.13, executed by the State to the common school fund under the act of November 15, 1864, were "valid debts from the State to the common school fund," but it was expressly declared that "by the payment of said bonds, as aforesaid, the State does not recognize the validity of said attempted payments in treasury warrants."

Gen. Laws Texas 1883, p. 16.

From this review it clearly appears that whenever the subject has been acted upon by legislatures or constitutional conventions this attempted payment in worthless and void warrants has been denounced, with the exception of the special act of August 15, 1870, and this will be shown to have been enacted in flagrant and contemptuous violation of constitutional law, State and national.

The Pleadings and Nature of the Case.

On December 8, 1894, C. A. Culberson, then attorney general of Texas, instituted this suit in the district court of Travis county, Texas, in the name of the State of Texas against the plaintiff in error, and it was tried in the State courts by Attorney General Crane. It was a simple action of debt and to foreclose the statutory lien on the railroad property of that company to secure loans made by the State to the company and the Washington County Railroad Company under the act approved August 13, 1856, already referred to. There was not the most remote suggestion of a Federal question in the original petition.

Record, pp. 1 to 5.

The defendant company filed a voluminous answer, in substance pleading (1) part payment of interest and sinking fund in lawful money, and (2) payment of the balance in warrants and treasury notes of the State of Texas issued after the secession ordinance was passed and which said payment in warrants and treasury notes was authorized by several acts of the legislature enacted between 1861 and 1865, and heretofore set out. It was insisted in the answer that these several acts of the legislature and the acts passed August 13 and 15, 1870, heretofore referred to, constituted contracts between the State and the company which were within and entitled to the protection of article I, section 10, of the Constitution of the United States, to the effect that no State shall pass any law impairing the obligation of contracts, and that to disallow payment under these statutes would deprive the company of its property without due process of law, in violation of the fourteenth amendment. This answer, however, did not point out any law of the State of Texas, constitutional or statutory, under which it was sought to impair the obligation of the alleged contracts or which directly or indirectly was intended to have such

effect or upon which such construction had been or could be placed.

Record, pp. 5 to 24.

Under the practice in Texas the replication of the plaintiff to the answer of defendant is termed the supplemental petition and contains no part of the statement of the cause of action.

47 Texas, 616, Rules 3, 4, and 5.

The first supplemental petition of plaintiff, The State of Texas, alleged that the pretended payment in warrants and treasury notes was illegal and void, because:

1. The said warrants and treasury notes were issued "in aid of the rebellion."

2. The company purchased said warrants and notes in the market for a nominal sum and sought to make payment with them at par.

3. The said warrants and notes were issued for the purpose of being circulated as money, in violation of the constitution of Texas.

4. The said warrants and notes were bills of credit, and inhibited by section 10, article I, of the Constitution of the United States.

Record, pp. 24 to 29.

5. That the public schools had a vested right in the fund loaned to the companies which the legislature could not destroy by authorizing payment in warrants. This contention, however, rested on the *State* constitution, not the Federal Constitution, as counsel for plaintiff in error argue.

Record, pp. 24, 39, 210.

The defendant company filed application and bond for the removal of the cause to the circuit court of the United States, alleging that the first supplemental petition of plaintiff, The State of Texas, showed that the cause of action was one arising under the Constitution and laws of the United States, which application was denied.

Record, pp. 29 to 38.

The subsequent pleadings of the plaintiff, The State of Texas, amplified the five grounds of defense to the alleged payment in warrants and notes contained in the first supplemental petition, and, in addition, insisted that if defendant company be allowed any credit for said pretended payments in warrants and notes it should not exceed the cash value thereof at the time they were delivered in so-called payment.

Record, pp. 38 to 43.

The defendant company, in reply, plead that the State having accepted the warrants and notes was estopped to question their validity, and if they were in fact and in law void and issued "in aid of the rebellion" the State was *in pari delicto* and not entitled to relief.

Record, pp. 43 to 49.

Judgment *in personam* for the amount sued for was rendered for the State, with foreclosure of the lien. The judgment was reformed so as to be *in rem* only and foreclosure of the lien on less road, and affirmed by the court of civil appeals for the third supreme judicial district; the supreme court of the State refused a writ of error, and upon application of plaintiff in error the chief justice of the court of civil appeals for the third supreme judicial district allowed a writ of error to review the judgment.

Record, pp. 73, 217, 271, 314.

The defendant company admitted in effect the cause of action of plaintiff unless the alleged payment in warrants and notes was legal (Record, pp. 96, 101, 135), and besides the question of removal the only question determined by the court of civil appeals was that said warrants and notes in which payment was pretended to be made were intended to circulate as money, and were therefore issued in contravention of section 8, article VII, of the State constitution of 1845. Whether they were issued contrary to section 10, article I, of the Federal Constitution was not considered.

Record, pp. 213, 214.

The court of civil appeals made the following finding of facts:

"We find that the bonds sued upon by the State were executed by the Houston & Texas Central railway and the Washington County railway, as alleged, and that the Central railway acquired all of the rights and property of the Washington County railway and took the property of that road subject to the liens asserted by the State. We find that the defendant made the payments pleaded in its answer, but that such payments as were made in State warrants were in treasury warrants intended by certain acts of the legislature of the State to circulate as money. We find that prior to August 13th, 1870, the Houston & Texas Central Railway Company's line of road extended from the left bank of Buffalo bayou, in the city of Houston, Texas, one hundred and fifty miles in a northwesterly direction through the counties of Harris, Waller, Grimes, Brazos, Robertson, Falls, and Limestone, and that the Washington County railway extended twenty-one and a quarter miles from the town of Hempstead, in Waller county, to Brenham, in Washington county, and we also find that the amount due the State is the amount for which the judgment was rendered. In view of the disposition we make of the case, these are all the facts we feel called upon to find."

Record, p. 211.

These facts and some others stated in the body of the opinion are conclusive upon this court.

Carter *vs.* Ruddy, 166 U. S., 493.

Strictly speaking, the questions of law arising upon the record under the decisions probably are (1) whether this court has jurisdiction, (2) whether the State treasury warrants were intended to circulate as money, and (3), if they were intended to circulate as money, whether the court of civil appeals erred in disallowing payments made in them; but as it is not entirely clear what will be considered (Dower *vs.* Richards, 151 U. S., 658), the whole case will be argued.

I.

This court is without jurisdiction, and the writ of error should be dismissed.

1. It is well settled that a cause is not now removable to the Federal courts unless the Federal question appears from the plaintiff's statement of his own cause of action.

Tennessee *vs.* Bank, 152 U. S., 454.
Hanrick *vs.* Hanrick, 153 U. S., 197.
Chappell *vs.* Water Works, 155 U. S., 108.
Telegraph Co. *vs.* Alabama, 155 U. S., 487.
Land Co. *vs.* Brown, 155 U. S., 488.
R. R. Co. *vs.* Davidson, 157 U. S., 208.
U. S. *vs.* Telegraph Co., 159 U. S., 553.
R. R. Co. *vs.* Skottowe, 162 U. S., 495.
Pratt *vs.* Gaslight Co., 168 U. S., 258.
R. R. Co. *vs.* Texas, 170 U. S., 236.
Sawyer *vs.* Kochersperger, 170 U. S., 303.

Counsel for plaintiff in error, while admitting the above rule and conceding that no Federal question appears from the original petition, as shown by the application for re-

moval, insist that a Federal question is presented in the first supplemental petition of the State, presumably referring to the allegation that the warrants and notes were bills of credit and were issued in violation of section 10, article I, of the Constitution of the United States, which takes the case out of this rule.

Under the present removal act this cause is not removable unless the action, as shown by the original petition and the first supplemental petition, could originally have been instituted in the circuit court of the United States; and, obviously, the interposition to the defense of payment, that the warrants were issued in contravention of the Federal Constitution, would not give the circuit court original jurisdiction, even though in the course of the litigation it may have been necessary to construe the Federal Constitution on that point.

Gold Washing Co. *vs.* Keys, 96 U. S., 199.
Tennessee *vs.* Bank, 152 U. S., 460, 462.
New Orleans *vs.* Benjamin, 153 U. S., 411.

In a somewhat similar case, the circuit court of appeals of the eighth circuit said:

"It is apparent that the only use the plaintiff proposes to make of the Constitution, is as a barrier to a defense which the plaintiff suggests the defendant may set up. The appeal to the Constitution is made, not to support the plaintiff's cause of action, but by way of replication to an anticipated defense."

City of Fergus Falls *vs.* Fergus Falls Water Co., 72 Fed. Rep., 875.

Seeking to avoid the decision in *Tennessee vs. Bank, supra*, and others cited which follow it, counsel for plaintiff in error (Mr. Carlisle) argues (1) that this action was not brought on the bonds, and (2) that it was part of the plaintiff's case to overthrow the payments by pleadings and

proof because the so-called contracts had been *executed*. As clearly as it was possible the action was on the bonds. The original petition declared on the bonds in express terms (Record, pp. 1, 2), and the prayer was that "judgment be given it that there is due upon the obligations aforesaid the sums of money heretofore stated, with interest as set forth" (Record, p. 4). The second reason assumes the existence and execution of contracts, the very questions in controversy. The theory of the State is that the laws authorizing payments in warrants were absolute nullities, and therefore her case or cause of action does not depend, as counsel urges, upon having "affirmative relief against its own executed contracts, and the payments made and accepted under them." To the State there were no contracts, and the alleged payments were absolute nullities (Richards *vs.* Stogsdell, 21 Ind., 74). On the contrary, the theory and defense of the plaintiff in error rested and depended upon the alleged contracts and payments, which, to be availed of, must have been alleged and proved.

It was not a question of setting aside payments on the ground of fraud, accident, mistake, or *duress*. The issue was payments *vel non*, and payment is essentially not only a defense, but an *affirmative defense*, which the defendant must plead and prove.

2 Green. Ev., sect. 516 (Lewis's edition).
Wolffe *vs.* Nall, 62 Ala., 24.
Lerche *vs.* Brasher, 104 N. Y., 161.
Tootle *vs.* Maben, 21 Neb., 617.

In a late case in this court, a city entered into a contract for the construction of water works. Upon completion of the work an order drawn on the city by the contractor in favor of the material-men for a sum of *money* was accepted, payable in *city warrants*. Suit was instituted upon the order and acceptance, to which a demurrer was interposed, and in disposing of the case this court said:

"In support of its second ground of demurrer the defendant city further insists that inasmuch as the acceptance of the city was a promise to pay in *city warrants*, the petition should allege that the plaintiffs demanded payment in warrants, and that the city refused to give them warrants for the order. The order, however, was to pay a certain sum in dollars and cents, and the promise was to pay the amount of the acceptance, *and if payment had been made or tendered, either in current money or city warrants, it was matter of defense, and the burden of proof was upon defendant.*"

Superior City *vs.* Ripley, 138 U. S., 97, 98.

This is the rule by statute in Texas:

"In every action in which the defendant shall desire to prove any payment, counter-claim or set-off, he shall file with his plea an account stating distinctly the nature of such payment, counter-claim or set-off and the several items thereof; and on failure to do so he shall not be entitled to prove the same unless it be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof."

Rev. Stats. Texas 1895, art. 1266.

Under this statute payment must be specially pleaded, and proof thereof is not admissible under a general denial.

Batts' Texas Statutes, art. 1266.

The plaintiff in error accepted this view of the law by specially and particularly pleading payments and offering proof thereof.

The burden was not only upon plaintiff in error of showing payments in warrants, but if any of them were lawfully receivable and others not, as having, for instance, been issued "in aid of rebellion," the burden was upon it to show that payments were made in warrants free from illegality or taint.

Land Grant Co. *vs.* Dawson, 151 U. S., 586, 604, 605.
Mill Company *vs.* Johnson, 156 U. S., 574.

2. No question arising under the Constitution or laws of the United States is otherwise presented by the record.

It will be remembered that the answer of defendant company sought to raise Federal questions: (1) By alleging that certain acts of the legislature of Texas passed between 1861 and 1865, authorizing the payment of interest and sinking fund on the loans to said company in State warrants and treasury notes, and acts passed August 13 and 15, 1870, the last purporting in effect to ratify said payment, constituted contracts between the State and the company which were within and entitled to the protection of article I, section 10, of the Constitution of the United States, to the effect that no State shall pass any law impairing the obligation of contracts; and (2) that to disregard the alleged payment in warrants and notes would deprive the company of its property without due process of law, in contravention of the fourteenth amendment to the Federal Constitution.

Record, pp. 12, 13, 14, 20, 21.

When the case reached the court of civil appeals it was not assigned as error that the district court refused to give effect to these contentions, *in violation of the Constitution of the United States.* The contention then was that the court refused to allow these payments *in violation of State laws* (Record, pp. 191 to 203) (Kipley *vs.* Illinois, 170 U. S., 182). The Federal questions were therefore waived and abandoned.

R. R. Co. *vs.* Herbeck, 60 Texas, 602.
Sayles' Texas Civil Practice, sec. 1168.

It is true these contentions after having been thus abandoned were renewed in the motion for a rehearing in the

court of civil appeals (Record, p. 234), but that was as if first presented on rehearing, and consequently too late.

Brown *vs.* Colorado, 106 U. S., 95.
Boom Co. *vs.* Boom Co., 110 U. S., 59.
Spies *vs.* Illinois, 123 U. S., 181.
R. R. Co. *vs.* R. R. Co., 137 U. S., 48.
Caldwell *vs.* Texas, 137 U. S., 698.
Miller *vs.* R. R. Co., 168 U. S., 131.

In abundance of caution, however, they will be traced through the record and fully considered.

In the petition for writ of error to the court of civil appeals (Record, p. 258) and in the motion for a rehearing thereon (Record, pp. 281, 282) the two Federal questions are again presented. In the application for a writ of error to review the judgment in this court there is a general averment in the language of section 709, Revised Statutes of the United States (Record, p. 295), and specific allegations (Record, pp. 301, 302, 309, 310, 313) covering the same two Federal questions which appeared in the answer and other pleadings named. So much of the assignment of errors in this court as affects the question is as follows:

"THIRD.

"The said court of civil appeals erred in deciding against the validity of an authority exercised under the United States drawn in question in this cause.

"FOURTH.

"The said court of civil appeals erred in deciding against the title, right, privilege, and immunity specially set up and claimed by said plaintiffs in error under the Constitution and statutes of and authority exercised under the United States.

"FIFTH.

"The said court of civil appeals erred in deciding in favor of the validity of statutes of and authority exercised under the State of Texas drawn in question in this cause on the ground of their being repugnant to the Constitution and laws of the United States.

"SIXTH.

"The said court of civil appeals erred in giving validity to the provisions of the constitution of Texas adopted in 1869 and the statute of Texas, approved August 13, 1870, drawn in question in this cause under a construction thereof, which impaired the obligation of the contract entered into between the State of Texas and the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and by virtue of the provisions of the acts of the legislature of the State of Texas approved February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864.

"SEVENTH.

"The said court of civil appeals erred in giving effect to the constitution of Texas adopted in 1869 and the statute of Texas approved August 13, 1870, as impairing the obligation of the contract provision entered into between the State of Texas and the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and by virtue of the acts of said State approved February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864.

"EIGHTH.

"The said court of civil appeals erred in sustaining the validity of the authority exercised under the State of Texas by the governor and comptroller thereof in canceling and discharging credits for payments made under and in accordance with the provisions of the acts of the legislature of Texas approved February 9, 1861, December 16, 1863, May

28, 1864, and November 15, 1864, drawn in question in this cause on the ground of its being repugnant to the Constitution and laws of the United States.

"NINTH.

"The said court of civil appeals erred in affirming the validity of the action of the State of Texas through the governor and comptroller in canceling and discharging credits given for payments made by the railway companies under which plaintiff in error, Houston & Texas Central Railroad Company, claims under and in accordance with the said acts of February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, whereby said plaintiff in error was deprived of its property without due process of law, contrary to the Constitution of the United States.

"TENTH.

"The said court of civil appeals erred in deciding in favor of the validity of the action of the State of Texas, which, if held valid, deprived said plaintiff in error of property without due process of law.

"ELEVENTH.

"The said court of civil appeals erred in sustaining the action of the State of Texas in depriving said plaintiff in error of property, to wit, valid treasury warrants issued under authority of said State of Texas, without due process of law by taking such private property for public uses without compensation therefor."

Record, pp. 290, 291, 292.

Assuming that the Federal questions relied upon are those specified in this assignment of errors, they will be considered with some additional propositions:

1. The third, fourth, fifth, and tenth grounds are too vague and indefinite for consideration.

Lawler *vs.* Walker, 14 How., 149.

Maxwell *vs.* Newbold, 18 How., 511.

Messenger *vs.* Mason, 10 Wall., 507.

2. The eleventh ground, besides being vague and indefinite, is without merit, because the fifth amendment is restrictive of Federal authority only.

Withers *vs.* Buckley, 20 How., 84.

Fallbrook Irrigation District *vs.* Bradley, 164 U. S., 112.

R. R. Co. *vs.* Nebraska, 164 U. S., 403.

Nor would this be taking of property for public use within any reasonable meaning of the decisions of this court.

R. R. Co. *vs.* Chicago, 166 U. S., 226.

Backus *vs.* Depot Co., 169 U. S., 557.

3. It is matter of astonishment that the sixth and seventh grounds should be presented. The plaintiff in error, in its answer and as otherwise pointed out herein, insisted that it was authorized to make payments in warrants and notes under the acts of February 9, 1861, December 16, 1863, May 28, 1864, and November 15, 1864. It also insisted that this right was confirmed, not denied, by the acts passed August 13 and 15, 1870 (Record, pp. 15, 16, 21, 22). The court of civil appeals held (Record, pp. 213, 214) that the acts of 1861, 1863, and 1864 above mentioned, which authorized the issuance of warrants to circulate as money, were in violation of section 8, article VII, of the State constitution of 1845, which declared that "in no case shall the legislature have the power to issue treasury warrants, treasury notes, or paper of any description intended to circulate as money." The validity of these acts, tested by the constitution of 1869, was neither considered nor decided by the court. Nor was it held, as the assignment of errors assumes, that the acts of August 13 and 15, 1870, were in conflict with the acts of 1861, 1863, and 1864. In considering the contention of plaintiff in error that the acts of 1870 ratified the previous legislation the court held that they could not be given that effect (Record, p. 215), because the constitu-

tion of 1869 contained a similar provision to the constitution of 1845 against the issuance of warrants and notes intended to circulate as money; but manifestly this does not raise a Federal question, inasmuch as legislation *subsequent* to the acts of 1861, 1863, and 1864 was not the basis of the judgment as to them, but as to these the basis was the constitution of 1845, and as to the acts of 1870 the basis was the constitutions of 1866 and 1869.

Palmer *vs.* Marston, 14 Wall., 10.

Waterworks *vs.* Sugar Co., 125 U. S., 15.

The rule is thoroughly settled and is thus stated by this court:

"If the judgment of the State court gives no effect to the *subsequent* law of the State and the State court decides the case upon grounds independent of that law a case is not for review by this court upon any ground of the impairment of a contract."

Bacon *vs.* Texas, 163 U. S., 216.

Nor will this court pass upon the character or existence of a contract unless the judgment of the State court gives effect to a *subsequent law* of a State.

Bacon *vs.* Texas, 163 U. S., 219.

4. It is evident that under the eighth and ninth grounds in the assignment of errors an effort is made to obscure and distort the proceedings in order to give this court apparent jurisdiction. It should be a sufficient answer to the eighth ground that the court of civil appeals did not sustain the authority exercised under the State of Texas by the governor and comptroller, but simply declared that the alleged payments were nuliities (10 Wallace, 540); the governor or comptroller is not "an authority exercised under any State" within the meaning of section 709, Revised Statutes (Bethell *vs.* Demaret, 10 Wallace, 537), and the Federal Constitution is not aimed at individual but State legislative action

(Waterworks *vs.* Sugar Co., 125 U. S., 30), and to the ninth ground, that there has been and will be no deprivation of property except by the decree herein, which is due process of law.

Morley *vs.* R. R. Co., 146 U. S., 171.

A real and not fictitious question is necessary to give jurisdiction.

Hamblin *vs.* Land Company, 147 U. S., 531.

But let us measure these grounds by section 709, Revised Statutes of the United States, under which alone this court can take jurisdiction, said section being as follows:

"A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Obviously jurisdiction does not attach under the first clause of this section, as there was not drawn in question the validity of any treaty or statute of or authority exercised under the United States. Nor does the second clause give jurisdiction because while there was drawn in question the validity of a statute of and an authority exercised under the State of Texas, on the ground of their repugnance to the

Constitution of the United States, namely, the acts of 1861, 1863, and 1864, yet no decision was rendered upon the point, much less "in favor of their validity."

Bank *vs.* Griffith, 14 Pet., 56.

Walker *vs.* Taylor, 5 How., 64.

Is any title, right, privilege, or immunity claimed under the Constitution or any treaty or statute or commission held or authority exercised under the United States, which will give this court jurisdiction under the third clause of this section? By the assignment of errors it is attempted to bring the case within the fourteenth amendment by alleging that the clerical act of the comptroller under the direction of the governor in restating the account was a deprivation of property without due process of law, but manifestly this could have no such effect and cannot be taken seriously (Wilson *vs.* North Carolina, 169 U. S., 586). Aside from this, beneath the thin disguise of the pleader, it is evident that no right, title, privilege, or immunity under the Federal Constitution is claimed or can in good faith be claimed. The right to pay the debt in State warrants and notes, which is the only right in controversy, arises, if at all, under the laws of the State and not under the Federal Constitution. This court in determining its jurisdiction will look beyond the mere language of the pleadings to the real character and source of the right asserted.

R. R. Co. *vs.* California, 118 U. S., 113.

The bare assertion of a Federal question is not sufficient.

New Orleans *vs.* Water Works Co., 142 U. S., 79.

Kaukauna Co. *vs.* Green Bay Canal, 142 U. S., 254.

5. Stripped of mere verbiage, the contention of plaintiff in error is that this court has jurisdiction because the court of civil appeals refused to give effect to the supposed contract or because its judgment in its effect impairs the obligation

of such contract. It has been clearly shown that no Federal question was decided or was necessary to be decided; that the decision was based wholly upon the ground that the warrants and notes in which payment of the debt sued on purports to have been made were issued in violation of the State constitution—a contention urged and insisted upon in Texas for thirty years; that this is purely a question of State law, and under all the authorities this court is without jurisdiction.

Knox *vs.* Bank, 12 Wall., 379.
Klinger *vs.* Missouri, 13 Wall., 263.
McManus *vs.* O'Sullivan, 91 U. S., 579.
Bolling *vs.* Lersner, 91 U. S., 594.
Crossley *vs.* New Orleans, 108 U. S., 105.
Water Works *vs.* Sugar Co., 125 U. S., 30.
De Sassure *vs.* Gaillard, 127 U. S., 234.
Bacon *vs.* Texas, 163 U. S., 216.
Paper Co. *vs.* Watson, 173 U. S., 443.
White *vs.* Leovy, 174 U. S., 91.

"Nor are we authorized by the judiciary act to review this judgment of the State court, because this judgment refuses to give effect to a valid contract, or because such judgment in effect impairs the obligation of a contract."

Morley *vs.* R. R. Co., 146 U. S., 171.

II.

If this court assumes jurisdiction the judgment of the court of civil appeals was right, upon the ground put by the court, and others, and should be affirmed.

FIRST.

The acts of the legislature of Texas approved February 9, 1861; December 16, 1863; May 28, 1864, and November

15, 1864, which authorized payments in State warrants, were unconstitutional and void.

This court has solemnly adjudged that "Texas continued to be a State and a State of the Union," notwithstanding the ordinance of secession (Texas *vs.* White, 7 Wall., 726), and counsel for plaintiff in error will probably concede that the people in that State during the period of the war lived under some constitution. Whether in or out of the Union and whatever the constitution, these acts were passed without constitutional authority in the following particulars:

1. *As impairing the obligation of contracts* between the State and the companies, evidenced by the bonds and the law of 1856, they were in violation of section 14, article 1, of the State constitutions of 1845 and 1861; of section 10, article 1, of the constitution of the Confederate States, with the exception of the act of February 9, 1861, passed before the Confederate constitution was adopted in Texas; or section 10, article 1, of the Constitution of the United States.

The bonds and coupons were payable in dollars, which means lawful money of the United States.

Bank *vs.* Supervisors, 7 Wall., 30.
Confederate Note Case, 19 Wall., 557.
Legal Tender Case, 110 U. S., 449.

If the warrants are held not to have been issued as money, the acts in question impair the obligation of the contracts, because payments are not to be made in dollars or money of any kind; and if the warrants are held to be money, besides being issued in violation of the State constitution, the obligation of the contracts is impaired because payments may be made not only in a different, but in a depreciated and practically worthless money and a money not authorized by Congress. It is undisputed (Record, pp. 136, 137, 166) that in 1863, 1864, and 1865 the warrants had a value not exceeding ten cents on the dollar.

It may be said, with reference to impairing the obligation of contracts, that the school fund was kept intact by the issue of bonds in lieu of warrants paid in. That is true as to some of the laws, but while the school fund lost nothing, the State did, which is the material inquiry.

Sturges *vs.* Crowninshield, 4 Wheat., 205.
Green *vs.* Biddle, 8 Wheat., 1.
Woodruff *vs.* Trapnall, 10 How., 206.
Virginia Coupon Cases, 114 U. S., 278.

2. As authorizing *the emission of bills of credit* by the State, they were in violation of section 10, article 1, of the Constitution of the United States.

Craig *vs.* Missouri, 4 Peters, 410.
Briscoe *vs.* Bank, 11 Peters, 257.
Darrington *vs.* Bank, 13 How., 12.
Legal Tender Cases, 12 Wall, 557, 558.
Virginia Coupon Cases, 114 U. S., 284.
Bank *vs.* Mahan, 21 La. An., 751.
Bragg *vs.* Tuffts, 49 Ark., 554.

3. As authorizing the *issue of treasury warrants intended to circulate as money*, they were in violation of section 8, article 7, of the State constitutions of 1845 and 1861.

In 1860, when the State and nation were at peace and when there was no necessity to violate the Constitution in order to float an independent currency, the legislature, at least ostensibly respecting the organic law, declared that unpaid warrants should not circulate as money. Eight days after the secession ordinance was adopted, foreseeing the need of some stimulus for paper money, the comptroller and treasurer were directed by law to receive treasury warrants *for money* in certain named transactions. In November, 1861 (Record, pp. 155, 156), the comptroller, who is a kind of secretary of the treasury for the State, made

elaborate recommendations to the governor to "provide and establish the par value of treasury warrants." The treasury, he said, was empty; it could not be replenished by the sale of bonds, and the taxes for the year were not available. His plan was to limit the issue of warrants to the revenue required and make the warrants "receivable for taxes and all public dues," which would make the warrants "equivalent to specie." The governor of the State, in his message of November 15, 1861 (Record, pp. 156 to 159), commended these recommendations of the comptroller to the legislature, urging the issue of treasury warrants, and in order to "cause them to appreciate to at least near their face value," insisted that they be made "receivable in payment of taxes and for all other public dues of whatever nature or kind." Accordingly, on January 10, 1862, the act of 1860 was repealed; the provision therein as to the circulation of warrants as money was abrogated, and warrants were drawn, as shown by the law and the testimony (Record, pp. 179 to 184), in size, shape, denomination, and color (Record, p. 214) suitable for currency. On the next day, January 11, 1862, State treasury warrants, not bearing interest, as well as treasury notes and coupons of the Confederate States, were made receivable "*as money*" *for all obligations due the State except in two cases.* These two exceptions were afterward removed.

Subsequently, on the same day, the treasurer and every other officer of the State and every officer of counties who received as public money State warrants or Confederate notes or coupons were required by law to disburse said warrants and notes and coupons "*as money,*" and officers who were authorized to receive public money were authorized to receive said warrants, notes, and coupons "*as money,*" except when expressly prohibited by some other law. These laws seem to have had some effect upon the value of State warrants, for in the message of the governor of February 5, 1863, he states that the warrants were more appreciated than

Confederate notes (Record, p. 161), although the currency was greatly depreciated, and corroborates this argument by the statement (Record, p. 163) that one of the causes of depreciation was that in Texas "paper representing money" was current. The intention and effort to cause warrants to circulate as money was still further manifested in the acts of December 16, 1863, and May 28, 1864. The constant cry was that additional demand for the warrants must be created in order to enhance and maintain their value. Governor Lubbock apparently was satisfied (Record, p. 158) if they would "appreciate to at least near their face value," while Governor Murrah (Record, p. 166) was anxious to create "for them a general and constant demand approximating to the amount issued." So new demands were created by the acts of 1863 and 1864. The legislature was to convene, with additional requisitions upon the treasury, and by the first of these laws railway companies that were indebted to the school fund were authorized to pay *all interest* due or to become due (payment had been postponed by an act of January 11, 1862, until January 1, 1864), *provided* the same was tendered in State bonds or treasury warrants prior to the meeting of the legislature; and by the act of 1864, referred to, the demand for warrants was increased by requiring railway companies, to avail themselves of the act of 1863, to receive the bonds and warrants at par for freight and passage. To this period only the 2 per cent. *sinking fund* and the 6 per cent. *interest* could be paid in warrants; so the act of November 15, 1864, was passed, creating a still further demand for the warrants by authorizing the *principal* of this inviolable fund to be paid in them.

We have therefore (1) the clearly expressed legislative intention that the warrants should circulate as money, (2) their actual and general circulation as such, (3) the size, shape, color, and denomination of paper currency, and (4) their receivability for taxes and every character of Government dues.

They were issued by the State, involved the faith of the State, and were designed to circulate as money on the credit of the State in the ordinary uses of business.

The court of civil appeals found as a fact that the payments made in warrants were in warrants issued *after* the time they were intended to circulate as money (Record, p. 214).

Virginia Coupon Cases, 114 U. S., 284, 285, and authorities cited in preceding paragraph 2 of this argument.

SECOND.

The acts of the legislature of Texas approved February 19, 1861, December 16, 1863, May 28, 1864, and November 15, 1864, were passed, and the action of the railway companies under and by virtue thereof was taken, in aid of secession, and were therefore null and void.

As bearing upon the question under consideration, these acts provided that State bonds and treasury warrants should be receivable for the interest, sinking fund, and principal of the loans made to the companies out of the special school fund, and all other Government dues. It has already been shown, generally, from executive messages and the laws themselves, that they were enacted in aid of the movement to withdraw the State from the United States. The railway companies did know and must necessarily have known of this purpose and knowingly participated in its execution. The currency provided by the acts assumed the place and was hostile to that of the United States. It was issued and used to support the civil government of Texas, then at war with the United States, and also to provide for the military support and necessities of those engaged in war against the United States.

In the latter case, particularly, under the decisions of this court, the currency was issued in aid of secession, and, with the acts of the companies in voluntarily using and purchas-

ing it for payment of its indebtedness, thereby enhancing its value and contributing directly to the prosecution of the war, was utterly null and void. The hostile spirit and purpose of these laws, apparent on their face, is emphasized by contemporaneous State legislation. In truth, bonds and warrants which were openly and avowedly issued for war purposes were receivable under the laws in question on the indebtedness to the school fund and were actually paid on that account. The trial judge, in his opinion (Record, pp. 56, 57), cited various acts of the legislature in proof of this. Briefly put, these acts show that besides providing for the expenses of the secession convention in 1861, provision was made to issue $4,000,000 in bonds and $2,450,000 in warrants *for purely war purposes.* All these unlawful bonds and warrants were, under these acts, receivable in payment of the debts involved in this action. That advantage was taken of these laws and the indebtedness incurred is apparent (Record, pp. 157, 159, 162).

Certainly, therefore, these laws and the conduct of the railway companies thereunder were "intended to aid rebellion" and were consequently void.

Texas *vs.* White, 7 Wall., 734.
Thomas *vs.* City of Richmond, 12 Wall., 357.
Hanauer *vs.* Woodruff, 15 Wall., 439.
Taylor *vs.* Thomas, 22 Wall., 479.
Lamar *vs.* Micou, 112 U. S., 452.
R. R. Co. *vs.* State, 52 Miss., 877.

No useful purpose would be subserved by reviewing all the cases decided by this court growing out of the organization of the Confederate States. In a very recent opinion most of the cases were examined, and from them the following was deduced:

"That the transactions between persons actually residing within the territory dominated by the government of the Confederate States, were not invalid, for the reason only,

that they occurred under the sanction of the laws of that government or of any local government recognizing its authority;

"That within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war, under the control of the local governments constituting the so-called Confederate States;

"That what occurred or was done in respect of *such matters* under the authority of the laws of these local *de facto* governments should not be disregarded or held invalid *merely* because those governments were organized in hostility to the Union established by the National Constitution; this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organized to effect a dissolution of the Union, were without blame, 'except when proved to have been entered into *with actual intent* to further invasion or insurrection:' and,

"That judicial and legislative acts in the respective States composing the so-called Confederate States should be respected by the courts, if they were not 'hostile *in their purpose* or mode of enforcement to the authority of the National Government and did not impair the rights of citizens under the Constitution.'"

Baldy *vs.* Hunter, 171 U. S., 400, 401.

Measured by these principles, the acts of the legislature in question were "hostile in their purpose," were enacted with the sole view of giving additional value to warrants issued in large measure to carry on the war, and unquestionably impaired the rights of citizens of Texas under the Constitution, particularly the children, born and unborn, the real

beneficiaries of the school fund. The "hostile purpose" and "actual intent" of the companies, mixed, as it may be, with an effort to reap private advantage, is equally clear and indisputable. They agreed, among other things, to take the warrants at par for freight and passage in consideration of being allowed to pay their indebtedness in them, thus indicating, with other facts heretofore stated, a sympathy for the State government and a purpose to aid its military operations. While this intention of the companies to "further invasion and insurrection" is proven, the law would impute it upon less direct testimony. In an analogous case this court said:

"He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act."

Hanauer *vs.* Doane, 12 Wall., 347.

It may be said that warrants issued wholly for the lawful support of the civil government of Texas, as contradistinguished from those issued for war purposes, were also made receivable for the debts due the school fund, and payment may have been made in part in them. The answer is that, even in that view, the legal and the wrongful are so blended in the laws that they are void for any and all purposes.

Taylor *vs.* Thomas, 22 Wall., 488.

Allen *vs.* Louisiana, 103 U. S., 80.

Bragg *vs.* Tuffts, 49 Ark., 554.

Tel. Co. *vs.* State, 62 Texas, 630.

THIRD.

The act of August 15, 1870, relied upon by plaintiff in error as ratifying and confirming the payments in warrants, is unconstitutional and void, so far as it purports to ratify these payments and to invest the fund in new railway bonds.

The two provisions of the act above mentioned—namely, as to ratifying payments and investing the fund in new railway bonds—are so blended and dependent upon each other that if either is void both are, upon well-known principles of constitutional construction.

So much of the act as attempts to ratify the payments is void because:

1. It impairs the obligation of the contracts between the State and the companies, in violation of the State and Federal constitutions, for reasons heretofore given.

2. It is in violation of section 4 of the fourteenth amendment to the Constitution of the United States and section 34, article 12, of the State constitution of 1869, as practically acknowledging and paying debts of the State thereby declared void, to wit, warrants issued in aid of secession.

3. It is in violation of section 6, article 12, of the State constitution of 1869 with reference to the issue of treasury warrants intended to circulate as money, and the Federal Constitution with reference to bills of credit, as an effort to do indirectly what was directly prohibited by these constitutions, both when the alleged payments were made and when the purported ratification was declared.

4. It is in violation of section 6, article 9, of the State constitution of 1869, which prohibits the diversion of the school fund to other than school purposes. The special school fund set aside by the act of 1854 was by this section for the first

time brought under the protection of the constitution against diversion. It will be recalled that the act of 1870 expressly directed the governor in making the settlement therein provided for to allow the companies credit for the warrants alleged to have been paid, aggregating $152,864.55. The act, however, in this particular, as in that with reference to the exchange of bonds, is not self-executing, and as every governor has refused to enforce it, these provisions have not been put into operation. This provision of the act is more than a diversion of this large sum to other than school purposes, in contravention of the constitution; it is a gift of it outright to the companies for their private use.

Section 9, article 9, of the State constitution of 1869 provides, in effect, that the legislature shall *annually* appropriate the interest accruing on the school fund for school purposes and invest the principal of the fund in bonds of the United States Government and in no other security. In plain violation of this the act of 1870, under consideration, provides that the *interest* then due shall go, not to the schools, but in exchange for new bonds of the companies, and that the *principal* (as well as interest) shall be invested, not in bonds of the United States, but in new bonds of the companies alleged to have been worth $250,000 less than the old ones.

Record, p. 144.

The act was passed in such palpable and reckless disregard of constitutional law that argument and elaboration are useless.

The general act of August 13, 1870, is not susceptible of the construction of ratifying the payments. It does not declare that the account shall be accepted as it stood on the *books of the comptroller's office* on May 1, 1870, but merely as it "stood on the first day of May, 1870," no doubt meaning as it lawfully stood. But if the act can be given the other interpretation, it is subject to the constitutional objections

urged to the special act of 1870 with reference to the ratification of payments.

If the account of the fund in the Record (pp. 115, 116, 117, 127, 128), which shows its standing on March 1, 1870, on the comptroller's books, is continued to May 1, 1870, on the theory of the State, deducting payments in warrants, the account will be as alleged in the petition and found by the court.

FOURTH.

By the act of February 9, 1861, treasury warrants were receivable in payment of the 2 per cent. *sinking fund*, but no payments of this fund are alleged to have been made in warrants. What payments of *interest* and *principal* were made were therefore made under the acts of December 16, 1863, May 28, 1864, and November 15, 1864. The finding of facts by the court of civil appeals does not show the dates of payments, but it is alleged in the answer that they were made between January 20, 1864, and May 11, 1865 (Record, pp. 11, 12), and the proof corresponded with this averment, the sum of $31,543.80 having been paid more than thirty days after the surrender at Appomattox (Record, pp. 116, 122, 123, 127, 129, 130).

By the laws under consideration, it will be remembered, *all* State warrants were receivable in payment of the school fund, and although the great bulk of the warrants issued were for *purposes of the civil war* (Record, pp. 159, 162, 170), and although, as we have seen, the burden was upon plaintiff in error to show payment, and, upon this branch of the case, payment in warrants free from the objection of having been issued "in aid of rebellion," yet it failed to do so (Record, pp. 177, 178, 185, 187).

The case, however, having been decided upon the single ground that all warrants in which payments were made (Record, p. 214) were utterly void, having been issued and

intended to circulate as money, it was unnecessary for the court to consider this last feature of the question of payment.

In this state of case it is insisted by the plaintiff in error that if the laws in question were unconstitutional and the payments in warrants were wholly unauthorized, the State is nevertheless not entitled to recover, because the contracts were *executed and completed* and the State and the railway companies were *in pari delicto*.

The answer to this is thus briefly but strongly put by Chief Justice Fisher, of the court of civil appeals, in rendering the opinion of that court:

"It is contended by appellant that if it should be held that the warrants in which the payments were made were illegal, that the State, through its officers, by authority of an act of the legislature having received the warrants as payments, the State was *in pari delicto* as to these payments; consequently she could not urge their invalidity. The legislature, in the exercise of its functions like other members of the official family of the government, must confine its acts within the constitutional limits that circumscribe its powers, and when it performs acts in violation of an express command of the constitution no more validity and life can be given to such acts because of the fact that it may be one of the agents of the government highest in authority than would be given to acts of minor agents of the State.

"The legislative department of the Government, in the exercise of its high functions in creating laws to govern the conduct of other departments of the Government, has no greater power by an unconstitutional law to bind the State than would be the case of an unauthorized or illegal act of an officer in some other branch of the public service. The doctrine of *in pari delicto* can have no application to the State in its sovereign capacity when the act out of which it springs is prohibited by the constitution. In such a case the act prohibited would be beyond the scope of the authority of any and all of the agents of the State from the highest and most exalted departments of the government to the lowest official who may represent it. If such was not the rule, the constitutional inhibition would in

effect be a dead letter upon the books, for it would permit parties who had pretended rights founded upon such illegal and prohibited acts to escape the effect of the offense denounced by the constitution, whenever they reached the point that they had actually violated it, by reaping the benefits of the unauthorized act."

The vice in the contention of plaintiff in error is the unsoundness of the premises. The *State* made no contract with the companies to receive warrants in payment of this debt and necessarily has executed no such contract. "A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and *limited by a written constitution* and established by the consent of the governed," and there is a plain distinction "between a State and the government of a State," said this court, in *Texas vs. White* (7 Wall., 721).

"In the discussion of such questions the distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. The constitution of the State is the limit of the authority of *its* government, and both government and State are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. So that, while it is true in respect to the government of a State, as was said in *Langford vs. United States*, 101 U. S., 341, that the maxim that the King can do no wrong, has no place in our system of government; yet, it is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its government, and

not to the State, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name."

Virginia Coupon Cases, 114 U. S., 290.

"Whatever having that effect, if operative, has been attempted or done, is the work of its government acting without authority, in violation of its fundamental law, and must be looked upon, *in all courts of justice, as if it were not and never had been*," else "of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them?"

Virginia Coupon Cases, 114 U. S., 293, 291.

The principle thus announced in the Virginia cases that when the legislature or State officers proceed in violation of the State or National Constitution they do not act for the State is now the accepted doctrine of this court.

Pennoyer *vs.* McGaughey, 140 U. S., 1.
In re Tyler, 149 U. S., 190, 191.
Reagan *vs.* Trust Company, 154 U. S., 389.
Scott *vs.* Donald, 165 U. S., 67.
Smyth *vs.* Ames, 169 U. S., 519.

Argument and amplification on my part would be superfluous. The opinions in these cases explore all the fields of illustration and sound all the depths of reason. If they stand, this judgment must stand; if it falls and the contrary doctrine takes root, constitutional inhibitions and guarantees will become the playthings of the ignorant or

lawless or corrupt; for it will be a declaration that they may be safely disregarded if it be done *fully and completely*.

For the reasons announced in the cases cited, as well as upon grounds of public policy, the doctrines of *estoppel*, *ultra vires*, and *in pari delicto* have no application to governments, particularly when the act is prohibited by organic law. In a case much relied upon by the plaintiff in error in the State courts, and which will probably be cited in its brief, this is plainly recognized, where the court said:

"The State is not in tutelage as one incapable of acting *sui juris*, but has capacity to act in all matters by its representatives and agents, and is bound by the acts and admissions of its duly appointed and recognized officers and representatives, *acting within the general scope of their constitutional powers*."

People *vs.* Stephens, 71 N. Y., 550.

In the familiar case of *Texas vs. White*, 7 Wall., 700, a plea of *estoppel* was interposed (pages 709, 710), and while not specially considered in the opinion, it was necessarily denied by the decree which was rendered. These doctrines in their application to municipal and other like public corporations were considered in *Thomas vs. City of Richmond*, 12 Wall., 349, 356, 357, where no constitutional provision was involved, and denied, the court declaring:

"But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third persons. This is necessary in order to guard against fraud and peculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but being *ultra vires*, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is *in pari delicto* with the officers, and

should have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a *matter of public policy* in which the whole community is concerned. And those who aid in such transactions must do so at their peril."

With the exception of the special act of August 15, 1870, the reprehensible and unconstitutional character of which has been shown, and which has been ignored by the authorities, the State has acted upon these principles since the pretended payments were made. At an early day, namely, April 2, 1866, within less than a year after the last payment in warrants (Sayles' Constitutions, 325, 331, 333, 334) and, under the circumstances of disorder and revolution, within a reasonable time, the transaction was repudiated by a State constitution. The companies were put upon notice that the unconstitutional acts of the agents and officers were disavowed, and the situation in which the companies now find themselves was assumed and maintained with this knowledge. Going even beyond this, the State, though confident of her position that the warrants were utterly void and incapable of acknowledgment, ratification, or payment under the Constitution, suggested in the pleadings (Record, p. 42) that the utmost plaintiff in error could claim as a credit was the cash value of the warrants at the time of payment. But this was declined by the company, as it offered no proof of value and did not insist upon such credit. Nor was the State compelled to return the warrants or pay their cash value before instituting this suit (Borden *vs.* Houston, 2 Texas, 611; Bates *vs.* Republic, 2 Texas, 618; Randolph *vs.* State, 73 Texas, 170; United States *vs.* Coal Co., 137 U. S., 170), for it will be conclusively presumed by the courts that she will do justice under the decision.

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